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THE LEGAL ADVISER  
DEPARTMENT OF STATE  
WASHINGTON

10,370

December 3, 1958

MEMORANDUM FOR THE SECRETARY

FROM : L. Loftus Becker *LB*

SUBJECT: Outline of U. S. Position on Legal Right of Western Powers to Continue to Occupy their Sectors in Berlin and to have Free Access Thereto.

1. The Western Powers are in Berlin and are entitled to free access to that city as occupying powers. Their rights of occupation and free access derive from their participation in the total defeat and unconditional surrender of the Third Reich and their assumption of supreme authority in Germany in conjunction with the U.S.S.R. As is clear from the Declaration of June 5, 1945 Regarding the Defeat of Germany, the supreme authority in Germany was assumed jointly. The Western Powers have never relinquished their rights with respect to Germany as a whole and with respect to Berlin, and such rights cannot be abrogated without their consent.

2. The various Four Power agreements assigning sectors to the Western Powers in Berlin and providing for specified rights of access to that city confirm the above-mentioned occupation rights of the Western Powers, and provide for the scope and method of their exercise, but the rights exist independently of such agreements.

a. Conceding, arguendo, that the Soviet declaration that the agreements are null and void could have the effect of terminating these agreements, it follows that the rights of the Western Powers in respect of Berlin, as well as Germany as a whole,

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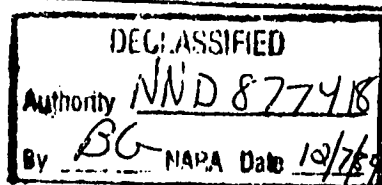
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would remain in force and effect. This includes access rights, as well as occupation rights, in regard to Berlin, because the Western Powers' rights of access to Berlin are of equal stature with the Soviet right to occupy the Soviet Zone. The Soviets did not grant back to the Western Powers access rights to Berlin in the exercise of Soviet occupation rights in the Soviet Zone. Instead, the Soviets took their Zone subject to the Western Powers' rights of access to Berlin. In this connection, U. S. troops were in occupation of substantial portions of the Soviet Zone at the cessation of hostilities and were withdrawn only after a Truman-Stalin exchange of correspondence in which the Soviets tacitly concurred in the rights of free access to Berlin.

- b. There has been no breach by the Western Powers of the quadripartite agreements relating to the occupation of Berlin and their rights of access to that city. Although, in the latest Soviet note, that charge is made in general terms, no facts are cited in support of the charge. Instead, allegations are made that Western Sectors of Berlin are utilized for espionage, the escape of refugees, and anti-Communist subversion which are matters unrelated to the agreements or any undertaking of the Western Powers therein contained.
- c. In so far as such agreements have not been performed as originally envisaged, the fault lies with the Soviets who have made full compliance impossible by such actions, for example, as withdrawal from the Berlin Kommandatura. Breaches of the agreements have all been on the part of the Soviets, of which the Berlin blockade is the most notorious of a long line of examples.
- d. Even if the Western Powers had violated the above-mentioned agreements, such violations, for the reasons stated above, would not have any effect on

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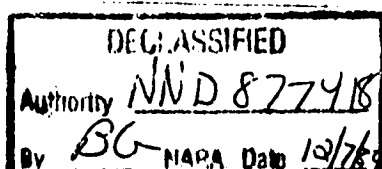
the occupation rights of the Western Powers, including their right to have free access to their respective zones in Berlin.

3. Alleged breaches of the Potsdam Agreement by the Western Powers would not affect their basic occupation and access rights in regard to Berlin or the quadripartite agreements which the Soviets have declared null and void.

- a. The Potsdam Agreement does not deal specifically with the occupation of Berlin or access rights. A fortiori -- as compared to the quadripartite agreements specifically spelling out such rights -- failure to perform on the part of the Western Powers would not affect their continued possession of such rights.
- b. The Protocol on Zones of Occupation and the Status of Berlin is distinct and separate from the Potsdam Agreement and had entered into force over six months prior to the Potsdam Conference. The Agreement on Control Machinery in Germany had been promulgated on June 5, 1945, almost two months prior to agreement on the Potsdam Protocol. The various agreements respecting access were never related in any way to the Potsdam Agreement.
- c. The particular provisions of the Potsdam Agreement upon which the Soviets primarily rely were limited to the "initial period" of occupation, which has long since expired.
- d. The performance of the Potsdam Agreement in accordance with its terms was rendered impossible by the Soviet Union, not by the Western occupying powers. In particular, the refusal of the Soviet Union to treat Germany as a single economic unit made achievement of the objectives of the Potsdam Agreement impossible.

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- e. The Soviets have not alleged that the Potsdam Agreement has become null and void by reason of alleged violations thereof by the Western Powers (presumably because Poland's right to occupy areas of Germany along the borders of Poland depends solely upon the Potsdam Agreement). If these alleged violations have not voided the Potsdam Agreement itself, a fortiori they cannot have the effect of voiding other quadripartite agreements.

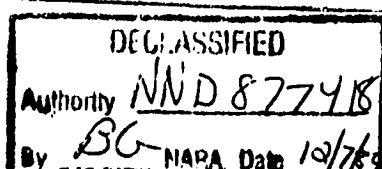
4. The agreements which the Soviets propose to denounce were entered into without specific limitation as to time and without provision for disavowal. The historical context makes clear they were to be maintained in effect until a German peace treaty came into force or until modified by the four occupying powers. International law does not recognize any right of unilateral denunciation under such circumstances. So far as we are aware, the doctrine of rebus sic stantibus, which apparently forms part of the Soviet legal position, has never been recognized as applicable in a particular case by any international tribunal, and in all probability it would not be maintainable in the present instance.

5. In no event would East Germany become the beneficiary of an attempted relinquishment or voiding by the Soviets of the occupation rights of the Western Powers in Berlin, without the consent of the Western Powers.

- a. Regardless of the question of recognition, Western Berlin has never been a part of East Germany.
- b. As previously explained, however, the Western Powers' rights as occupying powers cannot be divested without their consent and the usual form in which such rights are given up is an agreed final settlement in the form of a peace treaty. If the Soviets decide to relinquish

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their occupation rights in Berlin, there is no way of preventing them but this will have no effect whatsoever on the rights of the Western Powers, whose occupation rights and rights of access would continue unimpaired. Specifically, any control or regulation of access would in law be the responsibility of the three Western occupying powers and not of the GDR.

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